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NO. 85-1887

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated,

PETITIONER,

v.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF OPPOSING PETITION

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26 pp

SUMMARY

In depriving me of my right to try my claim, courts ruled on smokescreen issues that Warner Lambert created. Since the real issues remain to be adjudicated, procedural objections (Rspt Brief 8-10) will not survive scrutiny.

The 1986 appellate Detailed Order makes it easier than before for you to examine what actually occurred. Applying principles of basic justice, here, you will see that the outcome must be a decision favorable to me. In a word: I lacked an adequate mechanism and defendant failed to use a tool it could readily command.

1. If you read my petition and compare it with my former petition (83-2063), you will see, contrary to Warner's claims (Rspt Brief 8-9),

-I am raising issues of law, and

-As a result of proceedings on my 60(b) motion, there are new issues and new facts not present before and new bases for asking you to

exercise your power of supervision, e.g.,

..Did the courts apply the burden of proof appropriately given that, in the context of a motion to dismiss, I am the accused?

..Did the district court show a failure of good faith when (May 1985), acknowledging that I had not known of the "possible drastic consequences of the Rule 16 notice," and that it had an "obligation to attempt to solve the representational problem," it continued to deny relief from judgment, grounded solely in "cessation of substantive progress" for a time? (Pet D15-16)

2. You must consider erroneous the March 1985 finding of prejudice by delay (Rspt Brief 5), from which J. Burns retreated in May 1985 (Pet D15-16). It is not reflected in either of the two appellate opinions (Pet Appendix A & E).

Warner Lambert's excerpt (Rspt Brf 7-8) from the 1986 appellate order (Pet A1-4) omits the court's interpretive conclusion (Pet A 4). The court's analysis is favorable to me on the discovery issue Warner Lambert used as a smokescreen to mask their abdicating preparing a defense. Before dismissal, Warner Lambert failed to use tools the rules provide. Time since dismissal flows from their decision to risk all on a groundless motion to dismiss.

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COMMENTATORS

11 Wright & Miller 2873, 244 20

7 Moore 60.18(8) 138 20

TOPICS TO BE ADDRESSED

In my petition, as noted (Pet 19-21), I focused on key issues of the recent appellate Detailed Order. Warner Lambert do not respond to these issues. They present an excerpt (Rspt Brief 7-8) that omits the entire final portion of the Detailed Order, which contains the court's interpretative conclusion. Moreover, their latest paper fails to reflect significant changes in what the appellate court holds to be fact e.g., comparing the two orders:

a) The court no longer (1986) holds that I was "disputing" with my attorney and,

b) In place of a finding of "agreed discovery" (1983), says only that "letters arguably evidence the 'stipulation' referred to" (86).

With these changes, the court cut the ground from under factual claims that Warner Lambert has put forward in these proceedings and which they continue to make (e.g., Rspt Brief pp i, 4, 7-8).

More generally, Warner Lambert would have

you believe that: The issues have long since been adjudicated; I raise no issues of law; They have been prejudiced by delay; Procedural principles bar further consideration. In the past, courts have ignored my clearly documented rebuttals and objections. Since you do not yet have access to the full record, I fear you will simply take Warner Lambert's words at face value. But it is my rights that are in jeopardy and you should accord me the benefit of any doubt. Here I shall make these points:

I. I seek your supervisory intervention because the system broke down here most basically, I think, in regard to the burden of proof;

II. A finding of prejudice by delay is wrong;

III. Because the system has not operated as it should, earlier proceedings present no valid bar to now adjudicating the real issues;

IV. Possibly because my motions were mislabeled, some arguments have been overlooked.

I. BURDEN OF PROOF VIOLATED THROUGHOUT

Although I believe there is an aspect of

this case that is somewhat novel, I think the essential failure has been that the system has not applied its own rules. Although plaintiff in the underlying case, in the context of a motion to dismiss, my role changes to that of an accused. My rights are the ones immediately in jeopardy. The burden of proof falls on my accusers -- on Warner Lambert in claiming I failed to prosecute. Time and again, you will see this fundamental safeguard violated here.

At this point in my draft, I have numerous examples, taken from the five rulings (three district, two appellate), of instances where judges have failed to put the burden of proof on Warner Lambert. Because it would overburden this petition to include such details, I shall focus on how Warner Lambert succeeded in having an appellate court accept, in place of the obvious meaning of my words well-documented in the record before the district court, a misrepresentation of what I had written in my principal brief in my first appeal. Moreover, the

record before the district court contains no basis for Warner Lambert's misrepresentation. Here is part of what I said (A277-84 at 281*):

> [F]rom the time I was first confronted with the problem of Mr. Cochran's attempts to withdraw on unintelligible grounds, I have been plagued by the concern that there is some obvious alternative solution to the problem. I hope I can take assurance that there is not, in the fact that J. Burns did not suggest any alternative approach to me even though I asked her to (e.g., A 97). At the same time, the Judge's omission of any reference to these matters in her ruling is puzzling and troubling. On the other hand, as noted above (A275-7), the clerk's failure to issue a (local) Rule 16 order of dismissal may indicate that the court accepted the existence of the problem with Mr. Cochran as the "satisfactory explanation" required by the local rule.... What I knew at the time was that not understanding Mr. Cochran's reason for wanting to withdraw as counsel left me without the information I needed to manage my affairs responsibly -- either in choosing a new lawyer or in prosecuting my case against Warner Lambert (A92-3, 99). Freely, to have gone along with Mr. Cochran's withdrawal as counsel on the grounds that I distrusted him or, following J. Burns' denial of his (first) motion to withdraw, to have allowed him to resume work on my case as though the whole episode had not happened and in the light of his subsequent response to my questions (A92-3), or to have released him, left too many questions unanswered. I felt that my actions from then on, under any of the three options, would not be the informed actions of a responsible person. It would be unjust to deny me my day

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*"A" refers to pages in Appellee's Appendix

in court in circumstances where I could not responsibly have acted other than as I did and where I made good faith efforts to remedy the situation. The sparse docket entries following denial of my motion for partial summary judgment were due to "inability and not to willfulness, (or) bad faith" on my part. Societe, 1096.

See Warner Lambert's reply to this petition for examples of how it has been misrepresenting what I've said (e.g., Rspt Brief i, & 10):

"Petitioner's failure to prosecute the action for many years was the result of a running dispute with her counsel, whom she adamantly refused either to discharge, permit to withdraw, or proceed with the case" and:
"Fennell admits that she would not permit her counsel to proceed with the case, but would not allow him to withdraw."

I ask you, on what basis can Warner Lambert legitimately claim to speak on these matters? Significantly, its misrepresentations are absent from the recent Detailed Order (Pet A1-4) but they were embodied in the 1983 Detailed Order (Pet E3) as follows:

"In a motion for dismissal under (fed) Rule 41(b), the trial court may properly consider the relationship between the litigant and her attorney... appellant failed to prosecute... apparently because of a dispute with counsel. Fennell would not permit her attorney to with draw, nor would she allow the discovery procedure agreed upon in 1978 to proceed. A delay

in effecting agreed discovery is a proper factor to be considered in deciding whether to dismiss a case under Rule 41(b), Chira(80)"

Consider how annihilating these words were, issuing from a court, given facts such as:

a) My efforts to find help in having Mr. Cochran tell me why he wanted to withdraw included asking J. Burns (A 97, 99) to revive the dormant second motion to withdraw and have it heard by another judge so that Mr. Cochran could feel free to speak his mind;

b) So far as Mr. Cochran -- and hence I -- was concerned, the "discovery procedure agreed upon in 1978" left the next step in Warner Lambert's hands i.e., to renotice my deposition. See J. Burns' finding of May 1985 that "plaintiff and her attorney did not disagree on document production" (Pet Exhibit 3).

Considering, then, that:

1) The basic rule of "innocent till proven guilty" should have been applied to me when I found myself accused of failing to prosecute;

2) The rule had already been applied to Warner

Lambert's benefit when J. Burns denied my motion for partial summary judgment;

3) I had, early on, and repeatedly (A 93, 99) told J. Burns that Mr. Cochran's failing to tell me why he was moving to withdraw was affecting my ability to proceed, and asked for her help and for her guidance;

4) There was no support in the record for Warner Lambert's claim that Mr. Cochran had asked for my authorization to produce more documents or that I was disputing with my lawyer instead of pursuing my case; the question arises: How could Warner Lambert so readily have secured decisions in their favor?

Proceedings on my 60(b) motion revealed the mechanics of what went wrong. In two ways, J. Burns had departed from the record before her: a) In accepting Warner Lambert's unfounded suggestion that Mr. Cochran was asking me to authorize producing "more" documents and I was resisting; b) In failing to cognize in the record that, in opposing Mr. Cochran's motions

to withdraw, I asked for her help in obtaining information I needed to proceed with my case, and for her guidance on how to handle the situation. Moreover, in her original, 1983, ruling granting the motion to dismiss, J. Burns had not revealed that she had departed from the record in these ways, and thus she denied me information I needed to appeal effectively.

But the question remains why J. Burns, and later, the appellate courts, should so readily have been diverted from a straightforward application of basic good practice. Others, sophisticated in the law, may provide more definitive answers than I can. Along the way, lawyers/clerks have pointed out to me some going-in inequities between the parties: Widely-respected names on defendant's team (e.g., Rogers & Wells, Eginton), may have lent face validity to its claims and arguments vis a vis those of a litigant unknown to the legal community. Certainly, as I have carefully read Warner Lambert's briefs, it has seemed to me

that defense counsel have assumed that no one would conduct even the most readily-made check of their statements, or consider the actual meaning of their words in relation to the substantive points at issue. Also, in my 1983 appeal, Warner Lambert may have benefited from the coincidence that the judge who presided at my appeal wrote the Chira opinion, the model for deciding my case, which favored the arguments of Rogers & Wells, defense counsel in both cases, who claimed in both cases some dispute between plaintiff and lawyer. There are important differences between the cases, including the fact that, in Chira, defendant claimed that plaintiff had disobeyed a court order. In my case, it made the weaker claim that I had failed to honor an agreement to produce "more" documents, and supported that false claim by the false claim that my lawyer was asking me to authorize "more" production.

I don't know what the usual procedure is when case assignments produce such coinciden-

ces. I can see that it could be beneficial to all parties to have a judge who has become familiar with some domain of special expertise such as genetic engineering. But when the common features of a former and a new case include a domain of basic legal expertise likely shared by all appellate judges, there is no reason to assume any benefit accrues from having the same judge. Attention is then focused on whether or not the remaining common features between the former and new cases are likely to favor one party over the other. Here the coincidence of a defense lawfirm making similar arguments to ones the judge presiding in the new case had earlier found persuasive, has the potential for bias. It would not be be surprising if real differences between the cases were overshadowed by an unexamined sense of dejà vu -- that court and defense counsel had covered the ground before.

Common sense suggests that the presence of such factors is not sufficient to produce the

failure to do justice that occurred here. I think there had to be, in addition, some negative perception of me or, more likely, of "the plaintiff," that seemed plausible enough to justify, in the minds of the various judges involved, the extraordinary step of depriving me of my right. I have no answers to questions such as: What is that erroneous negative perception? What can judges have thought would motivate someone to bring an action and then write what I have written in response to my lawyer's moving to withdraw -- asking for a forum where my lawyer could speak freely and for the court's guidance on how to handle the matter? My continuing fear is that some misperception still persists -- that you will read it into the papers of this petition. I ask you then, if you find yourselves "explaining" the facts of this case in a manner that is not congruent with my account, please subject that "explanation" to close scrutiny: Is there evidence to support it? Have I had a chance to comment on that "evidence"?

II. WARNER LAMBERT ABDICATED THEIR OWN DEFENSE

In their Statement of The Case (5), Warner Lambert include J. Burns' words of March 1985 regarding a finding of prejudice by delay, from which J. Burns retreated in her ruling of May 1985. Such a finding would be in error.

Warner Lambert's false claim that we had failed to honor a commitment to produce more documents is a smokescreen that hides their abdicating preparing a defense. They had, in fact, set up a situation by which they impeded preparing their own defense.

Consider their posture on discovery, outlined in a letter of November, 1978. Without obtaining our commitment to further production (our position was on file), they state their intention to postpone deposing me until we produced more documents. Their letter makes clear we hadn't promised more documents (Eginton to Cochran, November 1978, A 121). Later, when Mr. Cochran twice got in touch with defense counsel (A 129-30) to inquire when they

wished to take my deposition, Warner Lambert declined and once again interposed the question of informal production by plaintiff.*

Once defendant knows the charge, it must assume responsibility for its defense. If it fails to use means the rules provide, that is defendant's own decision and its failure, which cannot fairly be laid at plaintiff's door. It was one thing for Warner Lambert to hope to obtain more documents informally. It

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* Moreover, the sincerity of their claim to need more documents is called in question by:

a) Failing to complain that we were remiss regarding production of documents -- in particular when, instead of responding to a briefing schedule, they demanded that the magistrate dismiss my action under (local) Rule 16 (A 132);

b) Never raising the possibility that they would move to compel documentary production and, when J. Burns indicated she would entertain motions to compel and a motion to dismiss (A 148), choosing to move to dismiss;

c) Stating (A 139) that, should the motion to dismiss fail, they would proceed with the two-stage discovery procedure (i.e., deposing me followed by responding to my interrogatories), which is "the discovery procedure agreed to in 1978" as plaintiff has understood it (A 131).

was a different matter when, without obtaining our commitment to produce more documents, they made deposing me contingent on their obtaining documents informally, to whose production we had objected. Still, they had options:

1. On their own initiative, move to compel production, if needed for their defense;

2. Proceed with my deposition without more production. [Perhaps because they had most of the disputed documents in their possession, this is the option Warner Lambert eventually stated they would choose if the court denied the motion to dismiss (A 139)].

3. Continue to do nothing, thus failing to take my deposition and, since the lawyers had agreed that Warner Lambert could depose me before we would again seek answers to our interrogatories, tieing our hands in moving to compel. [The option Warner Lambert chose.]

When the court invited motions to compel and a motion to dismiss (Pet F 8), Warner Lambert then chose to risk all on a groundless

motion to dismiss, cleverly constructed to make it appear that we had failed to honor commitments -- a claim that is false and mischievous, given that the rules permitted us to have the matter adjudicated by the court, but effective, nonetheless, in deflecting attention from the choices they had made. Others are better equipped than am I to assess the extent to which the techniques Warner Lambert used in fabricating a plausible-appearing motion to dismiss reveal its awareness that the motion was truly groundless.

Where Warner Lambert abdicated preparing their defense, took no initiative in alerting the court to the passing of time, asked for dismissal only when some action was required of them, and failed to use a tool they could readily command, a finding of prejudice by delay is in error (Finley).

III. PROCEDURAL OBJECTIONS FAIL HERE

In appellee's reply brief, Warner Lambert raised even more procedural objections than

they raise in their brief in opposition to my petition for certiorari. In appellant's reply, I responded in detail to all of those objections, as I shall summarise here. Although Warner Lambert state each objection in the most absolute terms, in reading the cases, I invariably found that considerations of finality, includability, and the others, are to be assessed in the context of an overriding policy favoring hearing cases on the merits. Guided by principles relevant to the exercise of discretion in regard to 60(b) motions, I examined, in turn, whether impediments to granting relief from judgment arise from competing values: 1) Orderly Procedure, 2) Finality of Judgment, and 3) Equity for Defendant, or from 4) Lack of substance in my underlying claim.

1. Orderly Procedures may be considered from two perspectives: a) The extent to which earlier proceedings show such an investment in good practice as to make reversing their outcome unthinkable, and b) The extent to which

proceedings on my 60(b) motion are flawed.
a) Through the case's history, orderly process has been violated to a degree that deprives the earlier proceedings of validity. In contrast to what occurred here, your ruling in Conley requires a court, when taking away my right was at issue, to apply the criterion: Can it say beyond doubt that no set of circumstances exists under which my right to a hearing on the merits should be preserved/restored? In place of courts disposed to hold Warner Lambert, as the accuser in a motion to dismiss, to strict standards of probity and consistency, I found: Courts departing from the objective record to accept conclusions prejudicial to me, and failing to cognize in that record my difficulty and my pleas for help; A district court that failed to reveal crucial considerations that led to its granting the motion to dismiss, thus preventing me from arguing effectively for the restoration of my case; An appellate court that failed to

note that I stated I lacked information on the reasons why my case was dismissed. The facts that: i) I am untrained in law and ii) in my 1983 appeal (A 271-4) and in moving for relief from judgment (A 172, 181-4, Aplt Brief, 21-3, 36, 39) had stated that I did not understand why my case was dismissed should have underlined sensitivity to due process here.

Accordingly, Warner Lambert's attack is readily disposed of: Because my arguments were not includable before, no obstacle arises from challenging the underlying judgment or prior affirmance by the appeals court (Aplt Reply 39 -42). As you said in Klapprott, "[A] liberal construction should be given the rule [60(b)] to the end that judgments which are void or vehicles of injustice not be left standing." b) Warner Lambert also fail in attacking the 60(b) proceedings on grounds of timeliness and loss of jurisdiction (Aplt Reply 42-4).

2. Considering finality of judgment, their claim that I am relitigating settled issues

fails. The courts have passed on smokescreen issues that Warner Lambert fabricated. Actual issues remain to be adjudicated (Aplt Rp 44-7)

3. Considering equities between defendant and plaintiff, the legal system provided options, disdained by defendant, but turned a deaf ear when I, finding no appropriate options, appealed for its help (Aplt Reply 47-8).

4. Finally, as described elsewhere (A 289), objective indicators of the merits of my claim exist (Aplt Reply 47).

Because there is nothing at all in the balance to weigh against granting a hearing to my meritorious claim, the district court's denial of relief from judgment was a clear abuse of discretion.

IV. OVERLOOKED ARGUMENTS

Perhaps because I mislabeled my motions, the recent appellate Detailed Order overlooks some of my arguments. It did not include the customary statement that all my remaining ar-

guments lack merit. But it failed, for example, to note that a main ground for my 60(b) motion was my lack of understanding why my case had been dismissed (Aplt Reply, 39 et seq.), and that J. Burns had rebuffed, with an erroneous finding (A 193), my request for her guidance on filing a 60b(6) motion.

Among other possibilities, perhaps my 60b(1) motion should have been grounded in surprise as well as judicial error or stated as a 60b(6) motion based on the fact that I did not understand why my case was dismissed, or perhaps my motions for reconsideration and evidentiary hearing should have been stated as a 60b(6) motion based on judicial error, first revealed in the ruling of March 1985.

It would be an error to ignore arguments because I mislabeled motions:

a) The commentators agree in emphasizing that parties are not bound by the labels they put on their papers and that what counts is the substance of what is said (e.g., 11 Wright &

Miller §2873, 244; 7 Moore 60.18(8) 138).

b) Appellate courts take the initiative in assigning procedural labels, e.g., noting that neither party had mentioned a certain procedural point, an appellate court chose to regard a notice of appeal as a motion, (Weiss).

c) Moreover, this court (Haines) requires that pro se papers be construed liberally.

CONCLUSION

The present failure of due process is remarkable. The courts at all levels should have been disposed in my favor at least to the extent of assuming that I wanted to prosecute, unless defendant could establish otherwise in the objective record. That objective record shows no failure to prosecute and it shows, in the face of difficulties caused by the legal system itself, that I have never ceased to try to prosecute my case. I ask you then to grant my petition and, in rectifying the breakdown that occurred here, help prevent a recurrence.

GERALDINE FENNELL, pro se,
June 26, 1986